

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 51 of 1989

WITH

INCOME TAX REFERENCE NO. 120 OF 1989

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI
and
Hon'ble MR.JUSTICE A.L.DAVE

- =====
1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

KLIN INDUSTRIAL PVT LTD.

Versus

COMMISSIONER OF INCOME-TAX

Appearance:

1. INCOME TAX REFERENCE No. 51 of 1989
MR KH KAJI for the Petitioner
MR BB NAIK for the Revenue
 2. INCOME TAX REFERENCE NO. 121 OF 1989
MR. MH KAJI for the Petitioner
MR. PRANAV G. DESAI for the Revenue
-

CORAM : MR.JUSTICE R.K.ABICHANDANI

and

MR.JUSTICE A.L.DAVE

Date of decision: 22/01/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE R.K.ABICHANDANI for the Court)

1. These two References raise common questions and have been argued together by the learned counsel for both the sides.

1.1 The Income Tax Appellate Tribunal, Ahmedabad Bench "B" has referred the following two questions, which are the subject matter of Income Tax Reference No. 51 of 1989, under Section 256(2) of the Income Tax Act, 1961 :

"(1) Whether, on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal was right in law in withdrawing rehabilitation allowance of Rs.26,910=00 granted by the Commissioner of Income-tax (Appeals) under section 33B of the Income-tax Act, 1961 in respect of the properties which were extensively damaged?"

(2) Whether, on the facts and in the circumstances of the case, the Income-tax Appellate tribunal was justified in remanding the matter to the Income-tax Officer to work out relief under Section 80J of the Income-tax Act, 1961?"

1.2 The Tribunal has also referred the following two questions, which are the subject matter of Income Tax Reference No. 120 of 1989, under Section 256(2) of the Income Tax Act, 1961 :

"(1) Whether, on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal was right in law in withdrawing rehabilitation allowance of Rs.1,73,886=00 granted by the Commissioner of Income-tax (Appeals) under Section 33B of the properties which were extensively damaged?

(2) Whether, on the facts and in the circumstances of the case, the Income-tax

Appellate Tribunal was justified in remanding the matter to the Income-tax Officer to work out relief under Section 80J of the Income Tax Act, 1961?"

2. The Tribunal has given elaborate statement of facts in Income Tax Reference No. 120 of 1989 and therefore, a detailed statement was not forwarded in the Income Tax Reference No. 51 of 1989 since the facts and issues involved were identical with the only distinguishing feature in Income Tax Reference No. 51 of 1989 that the assessee in that case had not claimed anything on account of terminal allowance under Section 32(1)(iii), whereas the assessee of Income Tax Reference No. 120 of 1989 such a claim had been made and allowed by the I.T.O.

3. When the References were called out for final hearing, the learned counsel appearing for the assessee in both the References stated that the assessee did not press for the question No.2 in both the References, which relates to relief under Section 80J of the Act. The question No.2 in both the References, therefore, stands disposed of accordingly as unanswered on the ground that the assessee has not pressed for the same. Since the Income Tax Reference No. 120 of 1989 has been argued as the main matter, we will draw the facts from that Reference and refer to the paper book of that Reference as both the learned counsel have done.

4. The assessee claimed rehabilitation allowance under Section 33B of the Act (to the tune of Rs.1,73,886=00 in Income Tax Reference No. 120 of 1989 and to the tune of Rs.26,910=00 in Income Tax Reference No. 51 of 1989), as per the detailed calculation given in the statement filed alongwith the return of income-tax. According to the assessee, its factory was damaged on account of flood in Morbi. Some of the assets of the factory were totally destroyed and washed away due to the flood, which resulted in terminal loss of Rs.62,300=00 to the assessee of Income Tax Reference No. 120 of 1989 that assessee also claimed rehabilitation allowance in respect of the other assets of the value of Rs.4,83,022=00.

4.1 The Income Tax Officer held that the assessee did not fulfill the conditions of Section 33B and negatived the claim for rehabilitation allowance. The C.I.T. (Appeals), however, held that the flood had affected the assessee as well as the other assessees who were carrying on business activities at Morbi in August 1979. Since in

case of similar assessees the Income Tax Officer had allowed the claim on 16th August 1984, the C.I.T. (Appeals) directed the Income Tax Officer to allow the assessee's claim under Section 33B. However, as against the claim of Rs.2,69,230=00 worked out by the assessee on the written down value of the assets of Rs.4,83,022=00, the C.I.T. (Appeals) reduced that figure of Rs.2,89,812=00 and computed 60% rehabilitation allowance under Section 33B thereof at Rs.1,73,886=00. On the value of the assets which was written off being Rs.62,300=00, 60% thereof i.e. Rs.37,380=00 was allowed as rehabilitation allowance. In the other case where the assessee claimed rehabilitation allowance in respect of damaged assets only the value of the assets was shown as Rs.74,754=00 which was reduced to Rs.44,850=00 on which deduction under Section 33B was allowed at the rate of 60% i.e. Rs.26,910=00.

5. Thus, the Income Tax Officer was directed to allow a deduction of Rs.2,11,266=00 to the assessee of Reference No. 120 of 1989 and Rs.26,910=00 to the other assessee under separate orders as rehabilitation allowance under Section 33B of the Act.

5.2 The Tribunal, in the appeal by the Revenue, held in both the cases that the assessee was entitled to deduction under Section 33B since the conditions thereof were duly satisfied. The Tribunal observed, "entire operations of the assessee were affected by the floods" that took place on 11th August 1979 during the previous year which was from 1st July 1979 to 30th June 1980. The Tribunal, while upholding the order of the C.I.T. (Appeals) only to the extent of allowing the claim in respect of the terminal allowance under Section 32(1)(iii) of Rs.62,300=00, set aside the order granting Rs.1,73,886=00 and Rs.26,910=00 in the other case as rehabilitation allowance for the "other assets" which were damaged in the flood, by holding that, in respect of the assets other than which were totally destroyed and written off, the assessee had claimed the same under the head of "flood rehabilitation account", and that, a deduction under Section 33B, if allowed, would mean double deduction.

6. It was contended by the learned counsel appearing for the assessee in these two References that section 33B refers to both "damage" and "destruction" for the purpose of rehabilitation allowance and reference therein to the provision of section 32(1)(iii) , which lays down the parameters for calculating the relief under that provision, is only for the purpose of calculating the

relief admissible under Section 33B. It was contended that the Tribunal was in error in holding that, in case of "damage", no relief under Section 33B can be given and doing so would amount to double deduction. It was also argued that the C.I.T. (Appeals) had not granted the relief under Section 33B on the entire amount of the written down value as claimed by the assesseees (Rs.4,83,022=00 in one case and Rs.44,850=00 in the other), but only on 60% of that written down value (i.e. Rs.2,89,812=00 and Rs.26,910=00 respectively) and granted allowance under Section 33B at 60% of the reduced value. In other words, he took 40% of the written down value as the basis for grant of the allowance and not the entire written down value and such a reduction should answer the parameters laid down by Section 32(1)(iii) of the Act. It was also argued that Section 33B is a section granting relief for loss caused due to natural calamity and additional benefit is contemplated thereunder apart from the normal deductions available by way of terminal allowance under Section 32(1)(iii) or revenue expenditure under Section 37 of the Act.

7. The learned counsel appearing for the Revenue have both supported the decisions of the Tribunal. The learned counsel appearing in Reference No.120 of 1989 contended that Section 32(1)(iii) was subject to Section 34 of the Act and since the value of the damaged assets other than the destroyed assets were not written off under the proviso to clause (iii) of Section 32(1), the claim in respect of the other assets was not allowable under Section 32(1)(iii) and no deduction could be claimed under Section 33B in respect thereof. He strongly contended that since Section 32(1)(iii) did not refer to the assets which were damaged, it was not applicable for the purpose of working out any rehabilitation allowance under Section 33B, because, Section 32(1)(iii) envisaged that the assets should be written off. Since the damaged assets were not written off, no amount by way of deduction would be allowable in respect of such assets under Section 32(1)(iii) and since the depreciation amount was not allowable by way of deduction in respect of damaged assets under Section 32(1)(iii), it would, a fortiori, would not be allowable even under Section 33B for the damaged assets.

7.1 The learned counsel, who argued for the Revenue in Income Tax Reference No. 51 of 1989, contended that rehabilitation allowance under Section 33B was available only in the situations which were enumerated under that provision, and that the provision itself section that the allowance should be 60% of what was allowable under

Section 32(1)(iii) of the Act. It is submitted that it was, therefore, necessary to work out what was allowable under Section 32(1)(iii), which exercise was not undertaken by the assessee while claiming the rehabilitation allowance, and therefore, he could not claim any such benefit.

8. The provisions of Section 33B and 32(1)(iii) of the Act, as they stood at the relevant time, read as under :

"Section 33B : "Rehabilitation of allowance "

Where the business of any industrial undertaking carried on in India is discontinued in any previous year by reason of extensive damage to, or destruction of, any building, machinery, plant or furniture owned by the assessee and used for the purposes of such business as a direct result of--

(i) flood, typhoon, hurricane,
cyclone, earthquake or other
convulsion of nature; or

(ii) riot or civil disturbance; or

(iii) accidental fire or explosion; or

(iv) action by an enemy or action
taken in combating an enemy
(whether with or without a
declaration of war),

and, thereafter, at anytime before the expiry of three years from the end of such previous year, the business is re-established, reconstructed or revived by the assessee, he shall, in respect of the previous year in which the business is so re-established, reconstructed or revived, be allowed a deduction of a sum by way of rehabilitation allowance equivalent to sixty per cent of the amount of the deduction allowable to him under clause (iii) of sub-section (1) of section 32 in respect of the building, machinery, plant or furniture so damaged or destroyed.

Explanation: In this section, "industrial undertaking" means any undertaking which is mainly engaged in the business of generation or

distribution of electricity or any other form of power or in the construction of ships or in the manufacture or processing of goods or in the mining."

Section 32(1)(iii)

Depreciation :

"32(1) In respect of depreciation of buildings, machinery, plant or furniture owned by the assessee and used for the purposes of the business or profession, the following deductions shall, subject to the provisions of section 34, be allowed -

(i) xxx

(ii) xxx

(iii) in the case of any building, machinery, plant or furniture which is sold, discarded, demolished or destroyed in the previous year (other than the previous year in which it is first brought into use), the amount by which the moneys payable in respect of such building, machinery, plant or furniture, together with the amount of scrap value, if any, fall short of the written down value thereof:

Provided that such deficiency is actually written off in the books of the assessee:

Explanation: For the purposes of this clause,--

(1) "moneys payable" in respect of any building, machinery, plant or furniture includes--

(a) any insurance, salvage or compensation moneys payable in respect thereof;

(b) where the building, machinery, plant or furniture is sold, the price for which it is sold;

xxxxxx "

9. Section 32(1)(iii) is in respect of depreciation of building, machinery, plant or furniture owned by the assessee for the purpose of business or profession, and it provided subject to Section 34, inter alia, for deduction in the case of any building, machinery, plant or furniture, "sold, discarded, demolished or destroyed" in the previous year other than in which it was first brought into use. The deduction provided therein is of the amount by which the "moneys payable" in respect of such building, machinery, plant or furniture, together with the amount of scrap value, if any, fall short of the written down value. The expression "moneys payable" under this clause includes any insurance, salvage or compensation moneys payable in respect thereof and where it is sold, the price thereof. The "written down value" is defined under Section 43(6) so as to mean, in the case of assets acquired in the previous year, the actual cost to the assessee; and in the case of assets acquired before the previous year, the actual cost to the assessee less all depreciation actually allowed to him under the Act, subject to the proviso and the explanations thereunder. Thus, any amount realised in respect of such asset which is discarded, demolished or destroyed, by way of insurance, salvage or compensation, and its scrap value, will not be allowable as "terminal benefit" as it is required to be deducted from the written down value, as per the formula prescribed by clause (iii) of Section 32(1). If such "moneys payable" and "scrap value" equals or exceeds the written down value, no amount will be allowable by way of deduction and in such cases, the rehabilitation allowance can also not be claimed under Section 33B, because, the provision operates when the amount of deduction is allowable under Section 32(1)(iii) of the Act. So far as the assets which were destroyed by flood were concerned, deduction of Rs.62,300=00 was allowed the assessee who claimed it as terminal allowance under Section 32(1)(iii) and the matching 60% rehabilitation allowance was also granted under Section 33B, for which there is no dispute.

9.1 The controversy now centers around the claim of rehabilitation allowance in respect of the "other assets" which are said to be extensively damaged in the flood. The claim of the assessee on that count was for Rs.4,83,022=00 and Rs.74,754=00 as aforesaid, being the written down value of those assets. The Revenue has contended that since section 32(1)(iii) refers to building, machinery, plant or furniture being "sold, discarded, demolished or destroyed", and not to an extensive damage, no amount would be allowable by way of deduction thereunder where the asset is "damaged", but

not "sold, discarded, demolished or destroyed". This contention, if accepted, would render the provision of Section 33B nugatory in the context of "extensive damage" to the assets which is specifically made a ground for putting up the claim for rehabilitation allowance when it is caused directly as a result of flood due to which the business of the industrial undertaking was discontinued.

9.2 Reference to Section 32(1)(iii) is made in Section 33B for the purpose of fixing the parameters for working out the rehabilitation allowance on the basis of the amount that would be allowable under Section 32(1)(iii), both in respect of "extensive damage" and "destruction to the asset". Therefore, in case where the extensive damage to the asset is caused and it falls under Section 33B, the amount of deduction will have to be worked out on the basis of the same formula, as is provided for the assets destroyed, namely, of minusing the "moneys payable" (as explained in Explanation 1 to Clause (iii) of Section 32(1)) and scrap value, if any, from the written down value of the damaged asset. On the amount so worked out, rehabilitation allowance under Section 33B will be at 60% thereof be allowable. It is obvious that the rehabilitation allowance under Section 33B is independent of other allowances permissible under the other provisions.

9.3 We may note here that the relief under Section 33B came to be withdrawn by Section 4 of the Finance Act of 1984 and the explanatory note in that regard, which is re-produced here, makes an interesting reading :

"9.2 Having regard to the fact that most of the industrial undertakings are adequately insured, the insurance money received by an assessee on the destruction of his industrial assets would ordinarily be more than their written down value. In such cases, no terminal allowance will be admissible to the assessee and he will, therefore, also not be entitled to any rehabilitation allowance under section 33B of the Income-tax Act. Besides, the deduction under section 33B can be availed of by an assessee only when he starts earning profits from the industrial undertaking after it has been re-established, reconstructed or revived. The cash benefit of this concession is, therefore, deferred until the industrial undertaking starts earning adequate profits. Thus, the provision in section 33B does not confer any significant benefit on the assessee.

9.3 In view of the aforesaid considerations

and with a view to simplifying the tax law by reducing the number of tax concessions which are not essential, the Finance Act has inserted a proviso to section 33B of the Income-tax Act to the effect that no deduction will be allowed under the said section in relation to the assessment year 1985-86 and subsequent years."

9.4 In our opinion, therefore, the Tribunal erred in withdrawing the entire amount allowed by the C.I.T. (Appeals), to these assessees under Section 33B in respect of extensive damage to the assets other than the destroyed assets.

10. It was contended that once we hold that the Tribunal was not justified in denying the benefit of Section 33B of the Act in respect of the assets which were extensively damaged, we must, as a corollary, restore the order of the C.I.T. (Appeals) in its entirety. From the order of the C.I.T. (Appeals), it was submitted that the appellate authority had worked out the rehabilitation allowance not on the entire claim of the written down value of the damaged assets, but had reduced that valuation by 60% in both cases and had then worked out the rehabilitation allowance at 60% of that amount and therefore, it should be assumed that he had taken the correct value for the purpose working out the allowance. This contention is misconceived, because, the C.I.T. (Appeals) did not make any calculation with reference to the parameters laid down under Section 32(1)(iii). He merely observed in para 7 of his order that the estimate of written down value of the assessee was on the higher side and in his opinion, 60% of such written down value would be the reasonable amount. There was, in our opinion, no scope for forming such opinion without reference to the parameters laid down under Section 32(1)(iii) which required the expression "moneys payable" to be considered in light of the Explanation thereunder, necessitating to take into account the fact as to what amount of insurance, salvage or compensation, if any, was received for the damage. The finding as regards the amount that would be allowable under the provisions of Section 32(1)(iii) was required to be based on objective criteria prescribed under that provision rather than by formation of a subjective opinion of reasonableness of the amount. Therefore, by mechanically restoring the order of the C.I.T. (Appeals), we cannot endorse the view which runs counter to our view on the provisions of law as expressed hereinabove.

11. In the above view of the matter, we answer the question No.1, in Income Tax Reference No.120 of 1989, as follows :

The Tribunal was not right in withdrawing the entire rehabilitation allowance of Rs.1,73,866=00 granted by the C.I.T. (Appeals) under Section 33B without working out the amount of deduction on the basis of formula, namely, the written down value minus the "moneys payable" and "scrap value", if any, as contemplated by Section 32(1)(iii) of the Income-tax Act, 1961, which was applicable even in respect of the assets extensively damaged leading to discontinuance of business under Section 33B, for ascertaining the rehabilitation allowance of 60% of the amount of deduction so worked out.

11.1 We answer the question No.1, in Income Tax Reference No.51 of 1989, as follows :

The Tribunal was not right in withdrawing the entire rehabilitation allowance of Rs.26,910=00 granted by the C.I.T. (Appeals) under Section 33B without working out the amount of deduction on the basis of formula, namely, the written down value minus the "moneys payable" and "scrap value", if any, as contemplated by Section 32(1)(iii) of the Income-tax Act, 1961, which was applicable even in respect of the assets extensively damaged leading to discontinuance of business under Section 33B, for ascertaining the rehabilitation allowance of 60% of the amount of deduction so worked out.

Both the References stand disposed of accordingly with no order as to costs.

[R.K.ABICHANDANI, J.]

[A.L.DAVE, J.]

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